

**UNITED STATES OF AMERICA
EASTERN DISTRICT OF WISCONSIN**

STATE OF WISCONSIN LOCAL)	
GOVERNMENT PROPERTY)	Case No. 2:15-CV-00142-JPS
INSURANCE FUND,)	
)	
Plaintiff,)	
v.)	
)	
LEXINGTON INSURANCE)	
COMPANY, THE CINCINNATI)	
INSURANCE COMPANY, and)	
MILWAUKEE COUNTY,)	
)	
Defendants.)	

**LEXINGTON INSURANCE COMPANY’S RESPONSE IN OPPOSITION TO
PLAINTIFF’S EXPEDITED NON-DISPOSITIVE MOTION FOR LEAVE TO
SUPPLEMENT THE RECORD REGARDING LEXINGTON INSURANCE
COMPANY’S MOTON FOR SUMMARY JUDGMENT**

Defendant, Lexington Insurance Company, (“Lexington”), by its attorneys, Fisher Kanaris, P.C. and Weiss Law Office, submits this Response in Opposition to the Fund’s Civil L.R.(h) Expedited Non-Dispositive Motion to Supplement the Record Regarding Lexington Insurnace Company’s Motion for Summary Judgment and in support thereof states as follows:

1. Lexington filed its motion for summary judgment on June 15, 2017. Document 102.
2. Plaintiff, State of Wisconsin Local Government Property Insurance Fund (the “Fund”) filed its Response to Lexington’s Motion on July 17, 2017. Document 126.
3. In its Response, the Fund did not assert under Fed. R. Civ. P. 56(d) that it had not completed sufficient discovery to respond to Lexington’s motion or identify any discovery it needed to properly respond to the motion.

4. Lexington filed its Reply in Support of its Motion for Summary Judgment, and therefore, the motion has been fully briefed since August 4, 2017. Document 138.

5. Over six weeks after the parties fully briefed Lexington's motion, the Fund seeks to file a sur-reply to "supplement the record." The Fund has not identified any of the facts which it purportedly discovered after filing its Response to Lexington's Motion.

6. Wisconsin Courts hold that sur-replies are not permitted as a matter of course and are disfavored. *Patterson v. Hepp*, 2107 WL 3261715 (E.D. Wis. July 31, 2017) (denying plaintiff's motion to file sur-reply which was filed one month after briefing closed and did not identify why it was necessary); *Novoselsky v. Zvucana*, 2017 WL 3025870 (E.D. Wis. July 17, 2017); *Williams v. Wisconsin Dept. of Workforce Development*, 2107 WL 1843317 (W.D. Wis. May 5, 2017) (denying motion for leave to file sur-reply noting that movant did not identify argument which it sought to add) and *Groshek v. Time Warner Cable, Inc.*, 2016 WL 4203506 *4 (E.D. Wis. August 9, 2016) (noting that courts rarely permit parties to file sur-replies).

7. In its Motion, the Fund failed to identify the purported evidence which it seeks to add to the record or the necessity of the motion.

8. To demonstrate a claim for bad faith under Wisconsin law, the Fund must show (1) the absence of a reasonable basis for Lexington denying benefits on the policy and (2) Lexington's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 376 (Wis. 1978). The undisputed evidence establishes that the Fund did not sustain a covered loss in excess of the \$1.8 million deductible plus the \$5 million payment made by Lexington. Because the Fund failed to establish in its Response that it was not fairly debatable that its covered loss did not exceed \$6.8 million, summary judgment should be entered in favor of Lexington. In its Motion for Leave to Supplement the Record, the

Fund still has not identified any evidence which would establish that Lexington's position was not fairly debatable.

9. Inasmuch as Lexington's Motion for Summary Judgment has been fully briefed since August 4, 2017, Lexington respectfully requests that this Honorable Court deny Plaintiff's Motion.

WHEREFORE, Defendant, Lexington Insurance Company, requests that this Honorable Court deny Plaintiff's Civil L.R. 7(h) Expedited Non-Dispositive Motion for Leave to Supplement the Record Regarding Lexington Insurance Company's Motion for Summary Judgment.

Respectfully submitted,

LEXINGTON INSURANCE COMPANY

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